SURANDRAN RAJARETNAM

v.

PUBLIC PROSECUTOR

COURT OF APPEAL, KUALA LUMPUR
SHAIK DAUD ISMAIL JCA
SITI NORMA YAAKOB JCA
DENIS ONG JCA
[CRIMINAL APPEAL NO: D 09-58-95]
16 FEBRUARY 1998

CRIMINAL PROCEDURE: *Prosecution - Close of prosecution - Standard of proof - Offences committed before 31 January 1997 - Whether 'beyond reasonable doubt' or 'prima facie' standard of proof applicable - Arulpragasan Sandaraju v. PP - Criminal Procedure Code (Amendment) Act 1997 - Whether retrospective*

CRIMINAL PROCEDURE: *Trial - Close of prosecution's case - Whether sessions judge applied right and proper standard of proof - Whether sessions judge misdirected himself - Whether such misdirection can be cured by s. 422 of the Criminal Procedure Code*

The appellant, a police inspector, was charged in the Sessions Court under s. 4(a) of the Prevention of Corruption Act 1961 for accepting a gratification of RM2,000. The offence was alleged to have been committed on 29 February 1992. At the end of the trial, the appellant was convicted and sentenced, and his appeal to the High Court was dismissed. Before the instant court, the sole ground of appeal advanced was that the sessions judge had erred in law in applying the '*prima facie*' standard of proof at the close of the case for the prosecution, when he ought to have applied the 'beyond reasonable doubt' standard of proof instead. The respondent, whilst conceding that the sessions judge had not applied the 'beyond reasonable doubt' standard of proof, contended that the sessions judge would have, irrespective of whichever standard of proof he applied, called on the appellant to enter on his defence.

Held:
Per Shaik Daud Ismail JCA

[1] The issue was **not** whether the sessions judge would still have called on the appellant to enter on his defence even if he had applied the 'beyond reasonable doubt' standard of proof. The issue was whether the sessions judge had applied the right and proper standard of proof at the close of the case for the prosecution.

[2] The standard of proof to be applied in all cases, whether before or after the decision in *Arulpragasan Sandaraju v. Public Prosecutor,* must necessarily be the 'beyond reasonable doubt' standard. The Criminal Procedure Code (Amendment) Act 1997 only takes effect after 31 January 1997, and it is **not** retrospective.

[3] Thus, it was clear that the sessions judge had misdirected himself, and this misdirection could not be cured by s. 422 of the Criminal Procedure Code as it involved a principle of general importance in the administration of justice.

[Appeal allowed; conviction quashed; sentence set aside; and a retrial ordered.]

*[**Bahasa Malaysia** Translation of Headnotes]*

Perayu, yang merupakan seorang inspektor polis, telah didakwa dalam Mahkamah Sesyen di bawah s. 4(a) Akta Pembanterasan Rasuah 1961 kerana menerima ganjaran sebanyak RM2,000. Kesalahan itu dikatakan telah dilakukan pada 29 Februari 1992. Di akhir perbicaraan, perayu telah disabit kesalahan dan dijatuhi hukuman, dan rayuannya kepada Mahkamah Tinggi telah ditolak. Di hadapan mahkamah semasa, alasan tunggal rayuan yang dibentangkan ialah bahawa hakim sesyen telah tersalah pertimbangan di sisi undang-undang dalam menggunakan standard bukti *"prima facie"* semasa penutupan perbicaraan sedangkan beliau sepatutnya menggunakan standard bukti "beyond reasonable doubt". Responden, semasa menyetujui bahawa Hakim Mahkamah Sesyen telah tidak menggunakan standard bukti "beyond reasonable doubt", menegaskan bahawa Hakim Sesyen itu mungkin telah, tidak berhubungan dengan mana-mana standard bukti yang digunakannya, mengarahkan perayu untuk memasuki pembelaan.

Diputuskan:
Oleh Shaik Daud Ismail HMR

[1] Isunya bukan samada Hakim Sesyen akan mengarahkan perayu memasukkan pembelaannya walaupun setelah beliau menggunakan standard bukti "beyond reasonable doubt". Isunya adalah samada Hakim Sesyen telah menggunakan standard bukti yang betul dan sesuai di penutupan perbicaraan kes tersebut.

[2] Standard bukti yang hendak digunakan dalam semua kes-kes, samada sebelum atau selepas keputusan dalam *Arulpragasan Sandaraju lwn. Pendakwa Raya,* hendaklah merupakan standard bukti "beyond reasonable doubt". Akta Kanun Prosedur Jenayah (Pindaan) 1997 hanya berkuatkuasa bermula 31 Januari 1997, dan tidak bersifat kebelakangan.

[3] Oleh itu, adalah jelas bahawa hakim sesyen telah tersalah arah, dan kejadian tersalah arah ini tidak boleh dipulih oleh s. 422 Kanun Prosedur Jenayah kerana ia melibatkan kepentingan umum dalam pengendalian pengadilan.

[Rayuan dibenarkan; sabitan dibatalkan; hukuman diketepikan, dan perbicaraan semula diperintahkan.]

[Editor's note: For a recent authority on the standard of proof applicable at the close of the case for the prosecution, please see also the decision of the Federal Court in Dalip Bhagwan Singh v. Public Prosecutor [1997] CLJ JT(18); [1997] 4 CLJ 645.]

Cases referred to:
Arulpragasan Sandaraju v. Public Prosecutor [1996] 4 CLJ 597 ***(refd)***
Bahruni Ismail v. Public Prosecutor [1997] 3 CLJ 267 ***(foll)***

Legislation referred to:
Criminal Procedure Code, ss. 180, 422
Prevention of Corruption Act 1961, s. 4(a), 13

[Appeal from High Court, Kota Bharu; Criminal Case No: 42-22-94]

For the appellant - Karpal Singh; M/s Karpal Singh & Co
For the respondent - Ahmad Rosli Mohd Sham DPP

Reported by Alex KC Lee

JUDGMENT

Shaik Daud Ismail JCA:

The appellant, an Inspector of police was originally charged in the Sessions Court at Kota Bharu for accepting gratification of RM2,000 from one Tan Hung Kiang as an inducement for telling the said Tan Hung Kiang to leave Kelantan so that the police would not arrest him, an offence punishable under s. 4(a) Prevention of Corruption Act 1961. The offence was alleged to have been committed at about 5.45pm on 29 February 1992 at Restoran Muhibbah No. 445 Jalan Dato' Nik Mustapha, Tanah Merah, Kelantan. At the end of the trial the appellant was convicted as charged and he was sentenced to four months' imprisonment and fined RM4,000 or in default imprisonment for another four months. In addition, the court imposed a penalty of RM2,000 under s. 13 of the same Act.

Not being satisfied with the decision, the appellant appealed to the High Court, which appeal was dismissed and the learned judge confirmed the conviction and the sentence imposed by the Sessions Court. He now appeals to this court.

His petition of appeal contains eight various grounds but at the outset of the appeal, learned counsel Mr. Karpal Singh informed the court that he was pursuing only one ground that is the standard of proof. Learned counsel pointed out that the record of appeal showed that, at the close of the prosecution case in the Sessions Court, the learned Sessions Court Judge applied the *prima facie* standard of proof, before he called upon the appellant to enter his defence. It was his contention that at the time of the trial of this case in the Sessions Court, the proper standard of proof to be applied at the close of the prosecution's case was the beyond reasonable doubt standard. Therefore, he added, that the learned Sessions Judge erred in law in not holding that the prosecution was bound by law to prove its case beyond reasonable doubt at the close of its case. In his grounds of judgment too, the learned Sessions Judge said that at the close of the prosecution's case, he was satisfied that the prosecution had proved a *prima facie* case and proceeded to call upon the appellant to enter on his defence.

The learned Deputy Public Prosecutor while conceding that the learned Sessions Judge did not apply the beyond reasonable doubt standard, further contended that, whatever be the standard of proof applied, whether *prima facie* or beyond reasonable doubt standard, the Sessions Judge would have arrived at the same decision.

With respect, we are unable to agree with this submission. The issue in this appeal is not as contended by the Learned Deputy Public Prosecutor.

The issue is whether the learned Sessions Judge applied the right and proper standard of proof at the close of the case for the prosecution.

The issue of whether the prosecution at the close of its case is required to prove a *prima facie* case or to prove a beyond a reasonable doubt case has been of great controversy for a number of years. As stated in *Bahruni bin Ismail v. Public Prosecutor* [1997] 3 CLJ 267, "without embarking into the history on this issue all over again" it has now finally come to rest with the decision in *Arulpragasan Sandaraju v. Public Prosecutor* [1996] 4 CLJ 597 where it was held that the standard of proof at the close of the case for the prosecution is beyond reasonable doubt. Therefore, in the light of this decision, to all intents and purposes, the standard of proof to be applied in all cases whether before or after the *Arulpragasan* decision, must necessarily be beyond reasonable doubt.

It would not be amiss to add here that since the *Arulpragasan* decision, s. 180 of the Criminal Procedure Code has been amended to provide for a *prima facie* standard of proof at the close of the case for the prosecution. This amendment unfortunately for this case, took effect only after 31 January 1997 and there is nothing in the amendment to give it retrospective effect.

Therefore, in the instant appeal, we were unanimously in agreement with the submission of Mr. Karpal Singh that he learned Sessions Judge erred in law when he applied the *prima facie* standard of proof at the close of the case for the prosecution. We held that there was clear misdirection by the trial judge. We also held that a misdirection of this nature, which goes to the very root of the matter, is incapable of being cured by the provision of s. 422 of the Criminal Procedure Code, as the misdirection involves a principle of general importance in the administration of justice.

In the light of this, we allowed the appeal, quashed the conviction, set aside the sentence imposed and ordered a retrial before another Sessions Judge. We also ordered the penalty, if paid, to be refunded.

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